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No. 96-1440

In the Supreme Court of the United States

OCTOBER TERM, 1996

BYRON STILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed petitioner's conviction on his plea of guilty to a substantive drug count as to which the district court complied with Federal Rule of Criminal Procedure 11, even though the court of appeals vacated petitioner's conviction on a separate drug conspiracy count as to which the district court had failed to comply with Rule 11.

2. Whether the district court abused its discretion by denying petitioner's motion to withdraw his plea of guilty to a charge of using and carrying a firearm during and in relation to a drug trafficking offense under 18 U.S.C. 924(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 102 F.3d 118.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. The petition for a writ of certiorari was filed on March 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Louisiana, petitioner pleaded guilty to conspiracy to trafficking in cocaine, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to

a drug trafficking offense, in violation of 18 U.S.C. 924(c); and three money laundering offenses, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and 18 U.S.C. 1956(a)(2). He was sentenced to 121 months' imprisonment on the drug and money laundering counts, and to a mandatory consecutive 60-month term on the firearm count. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A17.

1. In February 1995, during a federal undercover operation, petitioner purchased four kilograms of cocaine for $20,000 at a motel in New Orleans. Federal agents followed petitioner from the motel to his residence. After detaining him, the agents executed a search warrant and found the four kilograms of cocaine in his house. The agents also searched the car that petitioner had driven to the motel and found a nine millimeter firearm under the front seat. Pet. App. A2-A3.

Petitioner pleaded guilty to all charges in the indictment. At the plea hearing, the district court informed petitioner that, based on his purchase of four kilograms of cocaine, he faced a mandatory minimum prison sentence of five years and a maximum sentence of 40 years on the drug conspiracy and the substantive drug counts. The court also informed petitioner of the maximum penalties for the firearm and money laundering offenses. Petitioner understood that his sentencing range under the Guidelines for those offenses was 70 to 87 months' imprisonment, and also that the firearm charge carried a mandatory consecutive sentence of five years' imprisonment. Pet. App. A3-A4.

At sentencing, the district court found that petitioner was responsible for five kilograms of cocaine—four kilograms from the purchase that led to his

convictions and one kilogram based on relevant conduct separate from the charged offenses. The finding that petitioner was accountable for five (and not four) kilograms of cocaine increased his mandatory minimum sentence on the drug conspiracy charge from five to ten years. See 21 U.S.C. 841(a), 846. That finding, however, did not affect the five-year mandatory minimum sentence on the substantive drug charge. See United States Sentencing Comm'n, *Federal Sentencing Guidelines Manual* App. E. at 877 (1994-1995 ed.) ("[T]he mandatory minimum penalty provisions of section 841(b) are based solely upon the amount of drugs that the court finds was actually involved in the substantive distribution count."). The district court continued the sentencing hearing to permit the probation office to recompute petitioner's sentencing range, but the court did not advise petitioner of the change to the mandatory minimum on the drug conspiracy charge. Pet. App. A4-A5.

While petitioner was awaiting sentencing, this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), that, to be convicted under 18 U.S.C. 924(c) of "using" a firearm "during and in relation to" a crime of violence or a drug trafficking crime, a defendant must actively employ the firearm: mere possession and accessibility of the firearm does not constitute a "use" under the statute. Petitioner moved to withdraw his guilty plea to the firearm charge based on the decision in *Bailey*. The district court denied the motion. Pet. App. A5-A6.

In calculating petitioner's sentence, the district court grouped the drug and money laundering charges and sentenced petitioner to 121 months' imprisonment on those counts. The court also imposed

the statutory five-year consecutive sentence on the firearm count. Pet. App. A6.

2. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A17. The court first held that the district court had violated Federal Rule of Criminal Procedure 11(c) by failing to inform petitioner of the correct mandatory minimum sentence on the drug conspiracy count. The court accordingly vacated the conspiracy conviction and remanded to permit petitioner to replead to that count. *Id.* at A8. The court, however, rejected petitioner's argument that the district court's Rule 11 error on the conspiracy count also required vacatur of petitioner's conviction on the substantive drug count.[1] The court observed that the language of Rule 11 "speaks in terms of individual" charges and "does not contemplate overlap of the counts." *Id.* at A10. Here, the court reasoned, the district court had informed petitioner of the correct mandatory minimum and maximum sentences on the substantive drug count, and so there was no violation of Rule 11 with respect to that count. *Ibid.*

The court also held that the district court had not abused its discretion by denying petitioner's motion to withdraw his plea on the firearm charge. According to the court, *Bailey* did not require vacatur of his guilty plea to the Section 924(c) count, because that decision speaks only to the showing needed to establish "use" of a firearm, and petitioner's firearm

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[1] The court did not consider petitioner's argument that his firearm and money laundering convictions should be vacated as well, ruling that petitioner had waived his challenge to those convictions by not challenging them until his reply brief. Pet. App. A6 n.7.

conviction was proper under the "carry" prong of Section 924(c). The court emphasized that the indictment charged petitioner with both "us[ing]" and "carry[ing]" a firearm, and that petitioner admitted that he both used and carried the firearm during his drug offense. Moreover, petitioner had agreed with the government's account of the evidence against him, which included a statement that he had a pistol with him in the car while he transported the cocaine. Finally, a federal agent had testified that petitioner admitted that the firearm was in his possession when he drove his car to and from the purchase. Pet. App. A13-A15.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the district court's erroneous advice concerning the mandatory minimum sentence applicable to the drug conspiracy charge vitiated his entire plea. That contention is without merit.

Under Federal Rule of Criminal Procedure 11(c)(1), before accepting a defendant's guilty plea, a district court must "inform the defendant of, and determine that the defendant understands," *inter alia*, "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." Any variance from those requirements is disregarded if it does not affect the defendant's substantial rights. Fed. R. Crim. P. 11(h).

As the court of appeals recognized (Pet. App. A10), Rule 11(c) contemplates that the district court will separately inform the defendant of the maximum penalty, minimum penalty, and nature of each "charge to which the plea is offered." Fed. R. Crim. P. 11(c)(1);

see *United States* v. *Wetterlin*, 583 F.2d 346, 353 (7th Cir. 1978) ("[I]n order for the rule to accomplish its intended purpose it is essential for the district judge to inform the defendant of and determine that he understands the nature of each particular charge and the maximum possible penalty as to that charge, i.e., he should comply with Rule 11(c)(1) as to each individual charge for which a plea of guilty is offered."), cert. denied, 439 U.S. 1127 (1979). As a result, when a defendant who has pleaded guilty to multiple counts challenges his plea on the ground that the district court failed to comply with Rule 11, each count should be analyzed individually to determine whether there was a violation: a Rule 11 error with respect to one count of conviction does not automatically undermine the validity of other counts of conviction as to which there was no error. See, *e.g.*, *United States* v. *Abernathy*, 83 F.3d 17, 19-20 (1st Cir. 1996); *United States* v. *Darling*, 766 F.2d 1095, 1097-1100 (7th Cir.), cert. denied, 474 U.S. 1024 (1985); *Wetterlin*, 583 F.2d at 351-355.

Under those principles, the court of appeals correctly affirmed petitioner's conviction on the substantive drug charge in this case, even though it vacated his conviction on the drug conspiracy charge.[2] The

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[2] The court of appeals correctly ruled that petitioner waived his challenge to the validity of the money laundering and firearm charges by not raising that claim in his initial brief. See, *e.g.*, *United States* v. *Davis*, 52 F.3d 781, 783 (8th Cir. 1995); *United States* v. *Mitchell*, 31 F.3d 628, 633 n.3 (8th Cir. 1994); *Nagle* v. *Alspach*, 8 F.3d 141, 143 (3d Cir. 1993), cert. denied, 510 U.S. 1215 (1994). Although petitioner contends (Pet. 7 n.3) that his challenge to those counts was properly preserved, his fact-bound disagreement with the finding of the court of appeals merits no review.

reason is that, even though the district court violated Rule 11 with respect to the conspiracy charge, thereby justifying vacatur of that conviction, the court complied with Rule 11 as to the substantive drug charge by informing petitioner of the correct minimum and maximum sentences applicable to that count. See Pet. App. A10. There was therefore no error in the guilty plea proceedings that led to the entry of the substantive drug conviction.

Petitioner's reliance (Pet. 9) on *United States* v. *McMann*, 940 F.2d 1352 (10th Cir. 1991), and *United States* v. *Watley*, 987 F.2d 841 (D.C. Cir. 1983), is misplaced. Petitioner is correct in suggesting that, in both cases, the courts of appeals found a Rule 11 error because the trial courts had furnished erroneous information about the sentence applicable to one count of conviction, and also that the judgments of the courts of appeals in both cases vacated counts of conviction in addition to the particular count that was the subject of the Rule 11 error. Both decisions arrived at that result, however, without any discussion, and neither case held that, as a general matter, a Rule 11 violation with respect to one count of conviction requires vacatur of other counts of conviction as to which there was no Rule 11 error. Nor have any other courts of appeals expressly addressed that issue in any decision.

In addition, in both *Watley* and *McCann*, the defendants' decision to plead guilty to multiple counts was pursuant to a plea agreement under which other charges were dismissed. See *Watley*, 987 F.2d at 842; *McCann*, 940 F.2d at 1354. In that situation, the courts' decision to vacate the entire plea may have been premised on a conception of the plea agreement as an aggregate bargain that must stand or fall as a

whole. Cf. Fed. R. Crim. P. 11(e)(4) (allowing defendant to withdraw plea if plea agreement is rejected by the court). Here, by contrast, petitioner had not entered into a plea agreement. Pet. App. A4 n.2.[3]

2. Petitioner also contends (Pet. 11-14) that the district court erred in denying his motion to withdraw his plea to the firearm count. That fact-bound claim merits no further review.

Under Federal Rule of Criminal Procedure 32(e), a district court may allow a defendant to withdraw a guilty plea before sentencing for a "fair and just reason." The court's decision is reviewed for abuse of discretion. See, *e.g.*, *United States* v. *Jones*, 87 F.3d 954, 956 (7th Cir. 1996); *United States* v. *Cray*, 47 F.3d 1203, 1206 (D.C. Cir. 1995). According to petitioner, the district court abused its discretion here by refusing to allow him to withdraw his guilty plea to the Section 924(c) charge in light of this Court's decision in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), which defines the circumstances in which a defendant may be convicted for "using" a firearm in violation of that statute.

Here, however, the indictment charged petitioner with both "using" and "carrying" a firearm under Section 924(c), and petitioner pleaded guilty to violating both prongs of the statute. Pet. App. A13. As a result, his plea of guilty may be upheld if there is an adequate factual showing that he "carried" a firearm

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[3] Petitioner contends (Pet. 8-9) that the decision of the Fifth Circuit below conflicts with that court's own decisions in *United States* v. *Bounds*, 943 F.2d 541 (1991), and *United States* v. *Scott*, 987 F.2d 261 (1993). Any such conflict does not warrant review by this Court and is for the Fifth Circuit itself to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

within the meaning of Section 924(c), irrespective of whether his conduct constitutes "use" of a firearm after *Bailey*. See *e.g.*, *United States* v. *Mitchell*, 104 F.3d 649, 653-654 (4th Cir. 1997); *United States* v. *Riascos-Suarez*, 73 F.3d 616, 622-624 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996); see also *United States* v. *White*, 81 F.3d 80, 83-84 (8th Cir. 1996); cf. *Thomas* v. *United States*, 112 F.3d 365 (8th Cir. 1997) (no prejudice from failure to appeal motion to withdraw guilty plea to Section 924(c) charge after *Bailey* because evidence was sufficient to establish violation of the statute under the "carry" prong).

As the court of appeals correctly found (Pet. App. A15), there was a factual basis for petitioner's plea under the "carry" prong of Section 924(c). The government's statement of the evidence showed that petitioner kept the firearm under the front seat of his car while he transported the cocaine from the motel to his residence, and law enforcement agents seized the firearm from the car after his arrest. Moreover, petitioner admitted that he possessed the firearm while driving to and from the motel. Petitioner's transportation of the firearm in his car constituted a "carry" of that firearm under Section 924(c). See *Mitchell*, 104 F.3d at 653; *United States* v. *Fike*, 82 F.3d 1315, 1328 (5th Cir.), cert. denied, 117 S. Ct. 241, 242 (1996), 117 S. Ct. 1280 (1997).[4] Under those circumstances,

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[4] Any question whether the "carry" prong of Section 924(c) requires that the firearm be readily accessible to the defendant, see *Mitchell*, 104 F.3d at 653, is not presented here. The firearm that was found in the front seat of petitioner's car was readily accessible to him. See *Riascos-Suarez*, 73 F.3d at 623.

the district court did not abuse its discretion by denying petitioner's motion to withdraw his plea.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner's reliance (Pet. 13) on cases in which the courts of appeals have reversed Section 924(c) convictions in light of *Bailey* based upon faulty jury instructions or insufficiency of the evidence is misplaced. Those cases have no bearing on the issue whether there exists a sufficient factual basis for a guilty plea to a Section 924(c) charge.